United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7369

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARIA RIVERA MENDEZ, individually and on behalf of all other persons similarly situated,

Plaintiff,

LOUISA ROMAN, individually and on behalf of all other persons similarly situated,

Intervenor-Plaintiff-Appellant,

-against-

75-7369

HON. LOUIS B. HELLER, individually and as Presiding Justice of Special Term, Part V of the Supreme Court of the State of New York, Kings County, NAT LIEBOWITZ, individually and as Chief Clerk of Special Term, Part V of the Supreme Court of the State of New York, Kings County, both individually and on behalf of all other persons similarly situated and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants-Appellees.

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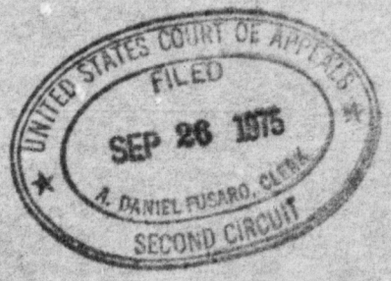
BRIEF FOR APPELLEES



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BRIEF FOR APPELLEES

This is an appeal from an order of a three-judge statutory Court of the Eastern District of New York (Mulligan, C.J., Dooling, Platt, D.J.J.) dated April 14, 1975, which reiterated its final judgment and decree of August 8, 1974 which, in turn, had

granted defendants' motion for summary judgment, denied plaintiffs' motion for the same relief and had declared New York Domestic Relations Law (N.Y.D.R.L.) § 230(5) valid under the Constitution of the United States. The April 14, 1975 order also permitted the intervention of plaintiff Louisa Roman upon the consent and stipulation of the defendants. Plaintiff Mendez's claim against the statute had become moot.

The complaint of both women against the statute was based on a claim that N.Y.D.R.L. § 230(5) is invalid insofar that it requires that one party to a divorce proceeding in a New York Court must have lived here for two years, if the other party does not reside in New York State, if the marriage did not take place in the State, if the parties had not resided here as husband and wife and if the cause on which the action is based did not take place here.

The three-judge Court also found that there was no case or controversy between the plaintiff and defendants but in light of the pendency of similar cases before the Supreme Court of the United States ruled on the validity of the statute and found "New York has granted the right to divorce and afforded a forum on a perfectly reasonable pattern" (380 F. Supp. 985, 995). A direct appeal to the Supreme Court was taken but on appellees' motion it was remanded to the District Court for the entry of a fresh decree pursuant to

Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974) because the finding of no case or controversy would have justified dissolution of the three-judge Court. Hence, the issuance of the April, 1974 order and the appeal to this Court.

Questions Presented

1. Does a person wishing to bring a divorce action against a non-resident spouse have a controversy with the Attorney General who has no responsibility for enforcing the law establishing jurisdiction of the Courts in matrimonial cases or with the Court Clerk who took no action in this case and whose duty would require him to permit the filing of a complaint or with a judge whose responsibility if he were presented with such a case, would be to make a judicial determination of the validity of the statute?

The court below answered "no". Appellees agree that the answer should be "no".

2. Can this Court review the decision of the statutory three-judge Court on the merits of the validity of the statute?

That question was not at issue below, since it is solely one for appeal. Appellees contend that the answer should be "no".

3. Was the decision of the statutory court clearly erroneous in holding that "New York has granted the right to divorce and afforded a forum on a perfectly reasonable pattern" especially since durational residence in the State for any period is not a precondition to obtaining a divorce in the State and since the statute is meticulously designed to serve compelling State interests in the fairness and finality of the State's judicial proceedings?

The court below answered "no". Appellees agree that the answer should be "no" although it is also appellees' contention that the decision on the merits of the validity of the statute can only be reviewed by the Supreme Court (see post, Point II).

4. Was the decision of the court below to deny a class action order clearly erroneous where such an order was unnecessary to present and preserve the issues raised and would bind unnotified, unidentified parties to plaintiffs' choice of forum and tactics?

The court below answered "no". Appellees agree that the answer should be "no".

Statutes Involved

1. The statute under attack, N.Y.D.R.L. § 230 provides:

> "An Action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or

5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action".

2. The statutes governing appeals from a three-judge court and to this Court provide:

a. 28 U.S.C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges".

b. 28 U.S.C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court".

3. The law of the State of California in which appellant Roman and her husband last resided together pertinently provides:

a. California Family Law § 4506:

"[Grounds for decreeing marriage dissolution or legal separation: Pleading]

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally: (1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage. (2) Incurable insanity".

b. California Family Law § 4530:

"[Residence required for judgment decreeing marriage dissoultion: Amendment of pleading in proceeding for legal separation, and ensuing date of commencement of proceeding for dissolution]

(a) A judgment decreeing the dissolution of a marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.
(b) In any proceeding for legal separation in which neither party, at the time such proceeding was commenced, has complied with the residence requirements of subdivision (a) either party may, upon complying with such residence requirements, amend his petition or responsive pleading in such proceeding to request that a judgment

decreeing the dissolution of the marriage be entered and the date of the filing of such amended petition or pleading shall be deemed to be the date of commencement of the proceeding for the dissolution of the marriage for the purposes only of the residence requirements of subdivision (a). Notice of such amendment shall be given to the other party in the manner provided by rules adopted by the Judicial Council".

Statement of Facts

A. The originial proceeding in the District Court

The original plaintiff, Maria Rivera Mendez, brought this action seeking declaratory and injunctive relief in March, 1974, in the United States District Court for the Eastern District of New York. She alleged that she had married Ernest Edgar Mendez on November 21, 1972, in the Commonwealth of Puerto Rico and lived with him there until she left him on March 22, 1973. She then came to New York City and found work here. Mr. Mendez apparently still resided in Puerto Rico.

Claiming that she wished to aobtain a divorce from her husband on the grounds of assault, Mrs. Mendez brought this action against Louis B. Heller, the Presiding Justice of Special Term, Part V (the Matrimonial Term) of the Kings County Supreme Court: Louis Pearlman,

the Clerk of that part* and Louis J. Lefkowitz, the Attorney General of the State of New York, she attacked the validity of New York Domestic Relations Law § 230 (5), (ante, at pp. 4-5), which provides that an action for divorce, separation or annulment may be maintained in New York even if the parties were not married in the State, had not resided there as husband and wife, the cause had not occurred in the State or both parties did not reside in the State at the time of the commencement of the action; but it may only be maintained in such an instance if one party has been a resident for at least two years before commencing the action.

The appellant immediately moved for summary judgment. The appellee cross-moved for summary judgment and for the convening of a three-judge court.

A memorandum requesting the convening of a three-judge court was issued by Hon. John F. Dooling, District Judge, in an opinion dated June 25, 1974, which also directed the parties to brief the question whether there was a case or controversy between them.

On August 8, 1974, the three-judge court (Mulligan, C.J.; Dooling, Platt, D.J.J.) denied a motion for a class action and granted summary judgment to the appellees on two grounds: In the first place it held that there was no case or controversy between the appellant

* Appellee Nat Leibowitz has succeeded Mr. Pearlman.

and the appellees; Secondly, it held that the statute was constitutional. Judge Dooling noted his disagreement with the latter grounds. A direct appeal from that judgment was filed in the Supreme Court.

B. The appeal to the Supreme Court

During the pendency of this case, the Supreme Court had had before it three relevant cases from other States. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa, E.D. 3J, 1973), prob. juris, noted, 42 LW 3468 (# 73-762, 1974); McCay v. South Dakota, 366 F. Supp. 1244 (D.S. Dak. 1973), app. pending (# 73-1248); Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I., 1973), cert. application pending (# 73-678).

The District Court in Sosna, supra, had upheld a one-year durational residence requirement for obtaining a divorce in Iowa. In Larsen, supra, the District Court had held that Rhode Island's two-year durational residence requirement for obtaining a divorce to be invalid. In McCay, supra, the District Court had held that South Dakota's one-year residence requirement was invalid.

On January 14, 1975, the Supreme Court affirmed the decision upholding the validity of the Iowa law on the grounds that there was no discrimination against recent travellers to the State and that the procedures did not deny due process of law. Sosna v. Iowa, 419 U.S. 393 (1975). On January 28, 1975, the Supreme Court vacated the

judgments in the Rhode Island and South Dakota cases and dismissed them as moot. Larsen v. Gallogly, U.S. , 43 LW 3415 (# 73-678, 1/28/75), South Dakota v. McCay, U.S. , 43 LW 3415 (# 73-1248, 1/28/75).

Thereafter on February 18, 1975, the Supreme Court vacated and remanded this appeal (U.S. , 43 LW 3491):

> "This judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York so that a fresh decree or order may be entered from which a timely appeal may be taken to the United States Court of Appeals. (28 U.S.C. § 1291) Gonzalez v. Automatic Employees Credit Union, U.S. (1974). Mr. Justice Douglas took no part in the consideration or decision of this appeal".

C. Proceedings on Remand

Because Mrs. Mendez was able to sue her husband for divorce in New York after March 22, 1975, the case was likely to become moot. Pursuant to an earlier representation, appellees consented and stipulated to the intervention of a new plaintiff, Louisa Roman.

Mrs. Roman alleged that she had married Thomas A. Roman on March 31, 1973 in Puerto Rico and that they lived together as husband and wife in Puerto Rico and then in California until June, 1974. Mrs. Roman states that she moved to New York in July, 1974.

She claims that she has grounds to obtain a divorce because of her husband's allegedly cruel and inhuman treatment of her in Puerto Rico and California.

On April 14, 1975, the three-judge Court permitted the intervention of Mrs. Roman and ordered that "the motion of defendants for summary judgment dismissing the complaint as extended to embrace the intervenor's complaint is granted".

From that order, appellant took this appeal.

Summary of Argument

The three-judge District Court upheld New York's statute (N.Y.D.R.L. § 230) that, in cases in which one spouse is a non-resident and in which New York has had no contact with the intact marriage, there is no jurisdiction over an action for divorce until one spouse has resided in the State for two years. This decision foreshadowed the Supreme Court's decision in Sosna v. Iowa, 419 U.S. 393, 42 L. Ed.2d 532 (1975) which upheld an absolute bar to divorce actions until one party had resided in the State for one year. The Supreme Court's decision actually disposed of the merits of this case. It held that such a durational residence requirement was rational and, as such, did not deny litigants equal protection of the laws nor unfairly burden their

right to travel nor yet deny litigants access to a Court so as to deprive them of due process of law. The Supreme Court held that such a statute furthers the State's interest of determining the marital status only of persons with an attachment to the State, of refraining from interfering with the status of marriages in which a sister state has a primary interest and in having its decrees given full faith and credit in other states. The Court also noted that litigants were not permanently cut off from access, even to the Iowa Courts.

Although the merits of this case are now thus easily disposed of, there are jurisdictional impediments to this Court's consideration of them.

The three-judge Court not only upheld the statute, but first held that because no defendant had an interest adverse to appellant, there was no case or controversy presented as required by Article III of the Constitution.

Neither the Court Clerk nor the Attorney General have any duty to enforce the challenged statute. Only the defendant judge would have such a duty; but it would arise only in his judicial capacity and only if he found the jurisdictional provisions constitutional. A suit against a Judge in such a situation is prohibited by the doctrine of judicial immunity and, because he had not enforced the statute against appellant or threatened to do so, by Article III.

Even if this Court were to find that a case or controversy existed, it may not review the merits of appellant's attack on the statute, since the statute was upheld by a statutory Court whose decision on the merits may only be reviewed by the Supreme Court. 28 U.S.C. § 1253 (ante, at pp. 5-6).

Finally, the District Court correctly held that a class action order was neither necessary nor appropriate where any individual plaintiff could seek the injunctive relief as broad as that available to a class of plaintiffs and since each member of the putative plaintiff class would have a separate claim against a separate defendant, his or her spouse.

But even if this Court were to see its way clear to review the three-judge Court's decision on the merits, it would find New York's statute valid under the principle announced in Sosna v. Iowa, 419 U.S. 393 (1975). With its impact limited to the situation when one spouse is a non-resident and when New York had no contact with the intact marriage, N.Y.D.R.L. § 230 is even more reasonable than the Iowa statute upheld by the Supreme Court, Sosna, supra.

POINT I

APPELLANT HAS NO CONTROVERSY WITH THE ATTORNEY GENERAL, A JUDGE OR CLERK WHO HAVE TAKEN NO ACTION AGAINST HIM.

The District Court held that there was no case or controversy between the appellant and appellees, since only Justice Heller could deprive appellant of her asserted right to sue for divorce and the challenge to him was in his judicial capacity in which his interest is not adverse to her, any more than the interest of any court is adverse to a litigant.

Neither Mrs. Roman nor Mrs. Mendez ever sought to sue their respective husbands for divorce in the State courts; so that none of the appellees had every injured them. Their federal cause of action has been based on the abstract hypothesis that they would be prevented from suing if they tried.

The Attorney General has neither the duty nor power to enforce the provisions of the Domestic Relations Law. While he is required to defend legislative enactments when their validity is challenged (New York Executive Law, § 71), it is in his position as an attorney for the people to defend the legislative enactment not as an adversary in a suit between privates persons. He is a "straw party" whose designation cannot support jurisdiction. See Bishop v. Hendricks, 495 F. 2d

289, 296 (4th Cir. 1974), cert. den. 419 U.S. 1070 (1974) in which the Court held that the residence of the administrator could not create diversity of citizenship where both the deceased and beneficiaries were residents of the same state as the defendant.

Appellants would do far more mischief with their theory in this case. Anyone could attack a state statute merely by suing the Attorney General who is bound to defend a statute attacked in a proceeding. If that were grounds for Article III jurisdiction, the Federal Courts could be choked with law-school hypothetical questions. The District Court held that the Attorney General (380 F. Supp. 985, 990):

> ". . .not be called on to put the statute at risk except where its validity was necessarily drawn in question in a litigation between adverse parties the disposition of whose rights inescapably required passing on the validity of the statute".

In Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), affd. 410 U.S. 179 (1972), pregnant women and physicians challenged Georgia's criminal abortion statutes in a suit against the Attorney General, a prosecuting attorney and chief of police. All three officials had some responsiblity for enforcing the criminal laws and the latter two defendants were unquestionably proper parties so that a controversy was presented without the Attorney General, but in this case the Attorney General has no duty to enforce jurisdictional rules in the divorce courts of the State and no other defendant has an adverse interest, either.

Similarly, the District Court properly concluded that the Court Clerk, had no adversary interest to the appellant and could not deny appellant an opportunity to file her petition for divorce (380 F. Supp. 985, 990):

> ". . .The Clerk of the Marital Part has no adversary interest; if the complaint is one that the Court, State or Federal, advises him is properly to be entertained and filed, it is his duty to file it, and there is, in addition, a duty on his part to file any complaint which tenders a non-frivolous question of jurisdiction requiring judicial resolution".

The Clerk could not thwart Mrs. Mendez's or Mrs. Roman's claim of jurisdiction. As the District Court held, the crux of appellant's suit was against Justice Heller in his judicial capacity, not as an adversary and long established precedent precludes such a suit (380 F. Supp. 985, 989-90):

> "The special question here is rather the plainer one of whether a prospective litigant may resort to the Federal Court for an advance determination of a jurisdictional issue, where the claim involved is one of constitutional dimension, by initiating an action against a state judicial officer to whom that issue would in a normal action be submitted for determination. Here it would fall to Mr. Justice Heller to decide the question tendered in this Court were plaintiff immediately to proceed to the filing of an action for divorce without alleging two years residency on her own part or that of her husband".

> ". . . .Hence, entertainment of plaintiff's suit here requires the conclusion that there is a genuine controversy between the plaintiff and one or more of the defendants in which they have an interest adverse to hers in the determination of the question. But Mr. Justice Heller has no such interest: if, as plaintiff contends, the statute is unconstitutional, then Mr. Justice Heller's sole interest is in so determining, and in denying effect of the statute. He is not an adversary of the plaintiff, but a judicial officer bound to decide the issue according to the law as he finds it. . . .his posture would be that of an entirely disinterested judicial officer and not in any sense the posture of an adversary to the contentions made on either side of the case. He would start by presuming that the statute is valid, as must this Court but his unconditional responsibility would be to determine the issue in the light of constitutional considerations no less than considerations of interpretation".

In support of these well established propositions, the District Court properly relied on the unequivocal decisions of the Supreme Court in North Carolina v. Rice, 404 U.S. 244 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); Pierson v. Ray, 386 U.S. 547 (1967); Muskrat v. United States, 219 U.S. 346 (1911); Liverpool, etc. S.S. Co. v. Commissioner, 113 U.S. 33 (1885) and distinguished the leading cases in which judicial officers were sued in their adversary administrative capacities. Boddie v. Connecticut, 401 U.S. 371 (1971); Law Students, etc. Council v. Wadmond, 401 U.S. 154 (1971); Ex parte Young, 209 U.S. 123 (1907).

The holding is also supported by the Supreme Court's recent decision in O'Shea v. Littleton, 414 U.S. 488 (1974), in which plaintiffs alleged a pattern of unfair judicial determinations. The Court held that there was no case or controversy presented by speculation as to illegal judicial conduct (Id. at pp. 493-5 [marginal notes omitted]):

> "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962). Nor is the principle different where statutory issues are raised. Cf. United States v. SCRAP, 412, U.S. 669, 687 (1973). Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). The injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical'. Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. U.S. 270, 273 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversey with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); Indiana Employment Division v. Burney, 409 U.S. 540 (1973). See 3B J. Moore, Federal Practice, ¶ 23.10-1, n. 8 (2d ed. 1971)".

Plaintiff's only controversy is with her husband; and he is therefore an indispensable party. See Glatstein v. Walsh, ____ F. Supp. ____(S.D.N.Y., MacMahon, D.J., 9/26/73), affd. without op. ___F. 2d____(2d Cir. No. 73-2632, 10/21/74), cert. den. ___U.S.____; 43 LW 3191 (10/15/74) in which the wife was held to be a necessary party to a suit charging errors and irregularities in a divorce proceeding deprived the plaintiff of his right to due process of law.

The only reason for framing the suit in this way and not suing appellant's husband was to avoid the prohibition against bringing a divorce action in a Federal Court. E.g. Phillips, Nizer, et al. v. Rosenstiel, 490 F. 2d 509, 512-4 (2d Cir. 1973); Spindel v. Spindel, 283 F. Supp. 797, 800-09 (E.D.N.Y. 1968).

It is not an undue burden for appellant to litigate the question in the State Courts. They must loyally enforce the Federal Constitution (NAACP v. Button, 371 U.S. 415, 427-8 [1963]) and they are subject to review by the Supreme Court. 28 U.S.C. § 1257(2). In fact, the appropriate way to raise the constitutionality of a Court's jurisdiction in a given proceeding is before that Court in the proceeding, itself. An anticipatory collateral attack is to no avail. Thus, the constitutionality of State "long-arm statutes" is determined in the actions brought, not in suits against Judges of the Courts where they might have been brought. E.g. Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Wash. Office of Unemployment Compensation and Placement, 326 U.S. 310 (1945).

Appellant claims that Justice Heller is sued in his administrative capacity, only; but he makes no determination on jurisdiction as an administrator. Appellant concedes that Justice Heller would not necessarily hear her case (Br., p. 11), but points to no responsibility of the administrative judge as an administrator, to enforce this statute. He would be presented with the question of jurisdiction here either on the hearing of the matrimonial action, or in an action to mandamus the clerk to file papers in such an action. In either instance he would be acting as a judge and, as such, would be immune from suit. Pierson v. Ray, 386 U.S. 547, 553-4 (1967). Any order affecting his jurisdiction would shackle him in the performance of his duty to determine his own jurisdiction. But see Larsen v. Gallogly, 361 F. Supp. 305, 310-11 (D.R.I. 1973) in which the Court blithely asserted otherwise.

Appellant does not suggest how Justice Heller's actions as an administrator, rather than as a Judge, has or could have an impact on her alleged Constitutional rights. Even if he was sued as an administrator it would be a "blunt and unnecessary affront to the state legal system" (Tang v. Appellate Division of the New York Supreme Court, First Department, 487 F. 2d 138, 143 (2d Cir. 1973), cert. den. 416 U.S. 906 (1974). In that case the Appellate Division was sued by an applicant for admission to the bar who had been deemed to be only a temporary resident of the State. While the decision rested on a

finding of res judicata (see concurrence of Judge Hays [Id. at 143]), the offense to the judiciary by such a suit was a secondary justification for dismissal.

Appellant argues (Br., p. 8) that counsel for appellee in moving for a convening of a three-judge Court stated that a declaration of invalidity by a single judge would not free him from his duty to enforce the law; but in that argument, counsel for appellee had already distinguished this situation from a case where the question of jurisdiction was presented to a judge in his judicial capacity (Memorandum of Law for Defendants in Opposition to Plaintiff's Motion for Summary Judgment [Index 5]), p. 18, n:

> "Justice Heller acting in his capacity as a judge would have the power to declare the statute invalid (But see Sternshuss v. Sternshuss, 71 Misc 2d 552 (Sup. Ct., Queens Co. 1972), but is immune from being ordered to make that decision for that would be an invasion of the core of judicial independence. Pierson v. Rhay, 386 U.S. 547, 553-4 (1967)".

The court below recognized (380 F. Supp. 985, 993) that in other cases (e.g. 380 F. Supp. 985, 989) dealing with durational residence requirements for divorce, the Courts had not questioned whether a case or controversy existed. But the District Court determined that the question raised by Judge Dooling in his Memorandum of June 25, 1974

could not be answered any other way. The only party adverse to plaintiff is her husband. Those other decisions which did not deal with the issue cannot overcome the persuasive arguments of the three-judge court here.

In Sosna v. Iowa, 419 U.S. 393 (1975), the only case passed on by the Supreme Court, the defendant judge had dismissed the plaintiff's petition on jurisdictional grounds and her husband was joined as a defendant in the federal court. Furthermore, the Court noted that the defendant judge did not claim judicial immunity and the Court expressly did not reach that issue.

By contrast in this situation, the jurisdictional issue cannot be avoided. It was the original ground for denying summary judgment to appellant. Having first been raised by Judge Dooling in his memorandum calling for the convening of a three-judge Court, the inescapable analysis of the three-judge Court demonstrated that there was not the adversity necessary to support federal jurisdiction.

POINT II

THE SECTION OF THE THREE-JUDGE COURT DECISION DENYING AN ORDER AGAINST § 230(5) CAN BE REVERSED ONLY BY THE SUPREME COURT

This appeal is before the Court by order of the Supreme Court of the United States dated February 18, 1975, 95 S. Ct. 1107:

> "The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of New York so that a fresh decree or order may be entered from which a timely appeal may be taken to the United States Court of Appeals. (28 U.S.C. § 1291) Gonzalez v. Automatic Employees Credit Union, ___ U.S. ___ (1974). Mr. Justice Douglas took no part in the consideration or decision of this appeal".

The Supreme Court by its order did not intend -- and, consonant with the jurisdictional mandates of 28 U.S.C. §§ 1253, 1291 and 2281, could not have intended -- for this Court to review that part of the three-judge court's opinion which addressed the merits of appellant's complaint. The Court was able to decline jurisdiction of the appeal solely because a decision of a three-judge court based on grounds of non-justiciability is, under several of its recent decisions, subject to Circuit Court review, prior to review by the Supreme Court. Thus the court was able, by ordering such review to take place, to

eliminate the need at that time for it to consider the three-judge court's decision on the merits. Should the question of justiciability be decided in appellant's favor,* however, the Supreme Court would then have immediate -- and exclusive -- appellate jurisdiction over the decision on the merits of the three-judge court.

A. The Supreme Court's view of its mandate under 28 U.S.C. § 1253 required remand on the justiciability issue

The Supreme Court is required, pursuant to 28 U.S.C. § 1253, to entertain appeals from orders "granting or denying... an....injunction in any civil action...required...to be heard and determined by a district court of three judges."

The Court consistently has expressed dissatisfaction with this Section because of the large mandatory caseload created by it [c.f. Phillips v. United States, 312 U.S. 246 (1941); Goldstein v. Cox, 396 U.S. 471 (1970)]. In recent years it has attempted to control this flow of § 1253 appeals through a series of holdings which, by reading the Statute in an extremely narrow fashion, have made direct appeal under § 1253 more and more difficult.

* A decision by this Court that the issue was justiciable would, in effect, hold that the convening of a three-judge court was necessary. This issue having been decided, the holding of the three-judge court on the merits would then be ripe for review by the Supreme Court.

The line of § 1253 cases which here concerns us is based on a literal interpretation of that section's definition of an appealable order as one required to be heard by a three-judge court. Appealability under § 1253, by this line of reasoning, turns on "whether the three-judge court was properly convened," Lynch v. Household Finance Corp., 405 U.S. 538, 541 (1971). Accordingly, if any question as to the three-judge court's jurisdiction has been raised below, the Court will remand for resolution of the question by a Circuit Court.

Gonzalez v. Employees Credit Union, 419 U.S. 90, 42 L. ed. 2d 249, 95 S.Ct. 289 (1975), cited by the Supreme Court in its order in the instant case, is a product of this line of reasoning. The case came up on appeal from a three-judge court which had dismissed the complaint for lack of standing. The Court observed that this ground was one "upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." (42 L. ed. 2d 240 at 258). It cited several of its earlier opinions [Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Schackman v. Arnebergh, 387 U.S. 427 (1967); Mengelkoch v. Industrial Welfare Commn., 284 F. Supp. 950, vacated to permit appeal to Court of Appeals, 393 U.S. 83 (1968); Wilson v. Port LaVaca, 391 U.S. 352 (1968)] which held that review of decisions of three-judge courts on such grounds must be sought

in a Circuit Court, and from this line of reasoning concluded that the decision of the three-judge court before it was likewise not within the scope of § 1253:

> "We hold, therefore, that when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court ab initio, review of the denial is available only in the Court of Appeals".
> (42 L. ed. 2d 249, 259)

The applicability of Gonzalez to the instant case is obvious; the three-judge court decision having been based in part on the same finding as Gonzalez -- non-justiciability -- the Court was compelled to remand.*

B. The merits of appellant's attack on the statute, having been determined by a three-judge statutory Court, are not reviewable by this Court

This Court has jurisdiction over "appeals from all final decisions of the district court...except where a direct review may be had to the Supreme Court" (28 U.S.C. § 1291).

* Although Gonzalez left open the question of whether § 1253 review should be limited solely to those orders denying injunctions which are based on a consideration of the merits of the constitutional claim, a later case, MTM, Inc. v. Baxley, 95 S. Ct. 1278, 81 (1975) did so hold.

As was seen in Part A, ante, the Supreme Court refused to exercise direct review over the three-judge court's decision in the instant case because the question of justiciability could have been decided by a single District Judge. It therefore remanded to this Court, its reference to Gonzalez making clear that the remand was for the purpose of allowing this Court to review the three-judge court's decision on justiciability.

Once the justiciability issue is decided, it is clear that this Court's jurisdiction is at an end. If it affirms the three-judge court's finding of non-justiciability there is no need to consider the merits. If it reverses, and finds appellant's complaint justiciable, such a finding removes the Gonzalez barrier to Supreme Court review -- the three-judge court will have been found to have been properly convened, and its decision on the merits, under § 1253, will then be appealable to the Supreme Court. This being so, under § 1291 this Court would be without jurisdiction.

1. A three-judge court's decision on the merits should not be reviewed by a Circuit Court

The effect of the Supreme Court's strict reading of § 1253 is that circuit courts review all decisions of three-judge courts which a single district court judge could have made concerning the case. Reviewable questions include whether the

constitutional issue raised was substantial (Idlewild Bon Voyage Liquor Corp., supra; Mengelkoch, supra; Schackman, supra); standing (Gonzalez); mootness (Rosado v. Wyman, 395 U.S. 396 [1969]); want of a case or controversy (Mitchell v. Donovan, 398 U.S. 427 [1970]); lack of statewide impact (Board of Regents v. New Left Education Project, 404 U.S. 541 [1972]).

The court has continuously made clear, however, that circuit courts considering the above questions cannot, should they decide that the issues are (or were) appropriate for a three-judge court, proceed to a decision on the merits; under § 2281, original jurisdiction over the merits of these issues lies exclusively with a three-judge district court, and under § 1253, appellate jurisdiction lies exclusively with the Supreme Court. And even in the situation where the merits have of necessity been considered -- when the circuit court examines the substantiality issue -- the court has made clear that, once a finding on the question of substantiality is made, the role of the Court of Appeals is at an end; it must remand either for dismissal of the complaint, or for consideration of the merits by a three-judge court. See Goosby v. Osser, 409 U.S. 512, 522 (1973) in which the Supreme Court reversed a Third Circuit finding of insubstantiality and remanded for consideration of the merits by a

three-judge court. The court expressly declined to "decide [or] intimate any view upon the merits" and held that the Court of Appeals likewise should not have done so:

> "8. The per curiam opinion of the Court of Appeals states: 'We have carefully considered each of the contentions raised by the [petitioners] and find them to be without merit'. 452 F. 2d 39, 41. In view of the result we reach, the Court of Appeals was without jurisdiction to render this holding insofar as it implies an adjudication of the merits of petitioners' constitutional contentions. Stratton v. St. Louis Southwestern R. Co., 282 U.S. 10, 75 L. ed. 135, 51 S. Ct. 8 (1930). C. Wright, The Law of Federal Courts 193 (2d ed. 1970)".

In the instant case, a decision by this Court that appellant's claim is justiciable would be a decision that the three-judge court had been properly convened, and once such a determination is made, the three-judge court's decision on the merits would become appealable to the Supreme Court under § 1253. This being so, § 1291 would clearly remove that decision from this Court's appellate jurisdiction.

2. This Court should not disturb Judge Dooling's holding that the relief sought by appellant is inherently injunctive

The only way in which this Court could consider the merits of appellant's claim would be for it to find both that her claim is justiciable, and that it should have been decided by a single district court judge.

As appellant has raised constitutional issues, the latter finding would be possible only if this Court, without ever being requested to do so by appellant, overruled Judge Dooling and found that, because appellant did not move for injunctive relief, the case is one solely for a declaratory judgment on the constitutionality of the statute in question.* Such cases are not within § 2281 et seq., and may be heard by a single judge.

* The fact that injunctive relief is not discussed in the three-judge court's opinion does not affect its appealability under § 1253, as it is assumed that, among the relief denied, was the inherently injunctive relief sought in the complaint. Lynch v. Household Finance Corp., supra.

The cases which have examined the opinion of a three-judge court and found that, because injunctive relief was neither granted nor denied, the opinion was reviewable by a Court of Appeals are not applicable, as they all involved three-judge court decisions which, while neither granting nor denying injunctive relief, held a statute unconstitutional. Cf. Thoms v. Heffernan, 473 F. 2d 478 (2d Cir. 1973) vacated on other grounds 418 U.S. 908 (1974) which specifically distinguished Lynch "'because there the three-judge court entered a judgment denying all relief sought by plaintiffs'". (473 F. 2d at 481, quoting from Lynch, 405 U.S. at 541, n. 5).

Judge Dooling, by memorandum opinion dated June 25, 1974, held that a three-judge court should be convened in the instant case, because appellant was requesting inherently injunctive relief.

This decision was based upon consideration of, inter alia, Samuels v. Mackell, 401 U.S. 66 (1971) and Steffel v. Thompson, 415 U.S. 452 (1974). The Judge held: "if declaratory relief is sought, or is significant, only as a predicate for coercive relief, and must have the same interfering effect as an injunction, it may be governed by the same considerations..."

Examining the possible "interfering effect" of a holding in appellant's favor, Judge Dooling concluded that a three-judge Court should be convened:

> "In the present case plaintiff challenges the two-year residency requirement on grounds that, if correct, would necessarily result in altogether invalidating the two-year requirement in every instance of its invocation. Unless her judgment was followed by a complete acquiescence in it by the Clerk of the state court and every judge before whom her case might come, it would be denied all useful effect even in plaintiff's individual case. In these circumstances it cannot be said that the existence of the prayer for declaratory relief and the absence of a motion for injunction reflect a decisive abandonment of the prayer for a final injunction, and render a Three-Judge Court unnecessary".

In Thoms v. Heffernan, 473 F. 2d 478 (2d Cir. 1973) vacated on other grounds 418 U.S. 908, 974, this Court, by Judges Oakes and Mansfield (Judge Timbers dissenting), held that a Court of Appeals can review the merits of a three-judge court's decision if that decision is silent on the injunction question. Although this holding on appellate jurisdiction is inapposite to the instant case, as it applies only to decisions finding the statute in question unconstitutional, a footnote on the effect of a later request for injunctive relief upon this Court's appellate jurisdiction over the merits is instructive:

> "1. If appellant and the other defendants below were to seek to enforce the statute appellee would presumably then renew his application for injunctive relief and the three-judge court would have to act and would presumably grant it, thereby giving appellant an opportunity to appeal directly to the Supreme Court under 28 U.S.C. § 1253. Thus any ruling we might make could be mooted. By appealing directly to this Court from the order below, however, appellant and the other defendants below may be treated as having agreed that they will not seek to enforce the statute (at least if we uphold the declaratory judgment below). This circuit has previously held such stipulations sufficient to convert actions originally seeking injunctions into actions solely for declaratory relief properly appealable to the Court of Appeals".
> (73 F. 2d at 480).

The First Circuit in Ortiz v. Hernandez Colon, 511 F. 2d 1080 (1975) jdgmt. stayed pending disposition of appl. to Sup. Ct., 43 L. ed 2d 770 found the above analysis of the effect of a later request for injunctive relief sufficiently compelling for it to decide to decline to exercise its appellate jurisdiction in a Thoms situation; instead, it followed a course recommended by Judge Timbers in his dissent in Thoms and followed by another panel of this Court in Abele v. Markie, 452 F. 2d 1121 (1971)(Judges Kaufman, Mansfield, and Levet) -- it remanded to the three-judge court, for definitive action on plaintiff's request for injunctive relief:

> "If we were to take jurisdiction, render a decision on the merits, and send the case back, either to enter an injunction, or to dismiss, and hence, deny one we would seem in so doing to have directly usurped the Supreme Court's jurisdiction".
>
> "In [Thoms] the court took jurisdiction and affirmed the district court. But at the same time, it expressly recognized that if, thereafter, the district court issued an injunction, the court of appeals' ruling would be automatically mooted. See 473 F. 2d at 480 n. 1. With due respect, this seems a most unsatisfactory solution. Our affirmance would give the state totally free rein to disregard our ruling, and hence require the district court to issue the injunction, thereby mooting our decision, according to Thoms, and then appeal to the Supreme

> Court. Nor could we criticize a state for so exercising the rights which Congress has given it. Rather, we think the majority in Thoms has again merely illustrated the wisdom of the old adage that hard cases -- here a peculiar statute -- make bad law. We prefer Judge Timbers' dissent, and the view of another panel of the Second Circuit which he quoted".
> (511 F. 2d at 1082-3).

C. Should this Court decide that appellant has raised a justiciable issue, it should then remand to the District Court for re-entry of three-judge court's decision

Should this Court decide that the appellant has presented a justiciable issue, it will have eliminated the sole barrier to Supreme Court review under § 1253; it must therefore remand to the district court for re-entry of the three-judge court's decision. Upon re-entry, appellant could file a timely appeal in the Supreme Court of that part of the decision which dealt with the merits of appellant's claim.

This Court would be in a situation similar to that of the Third Circuit in Oldroyd v. Kugler, 461 F. 2d 535 (1972). In that case, the three-judge district court found both that no substantial federal question had been raised and that the statute was constitutional.

The Third Circuit exercised jurisdiction over -- and proceeded to reverse -- that part of the three-judge court's decision which held that there was no substantial federal question. It then remanded all other issues to the three-judge district court because it lacked jurisdiction over the merits:

> "Since part of the judgment is a final judgment on the merits it is appealable to the Supreme Court pursuant to 28 U.S.C. § 1253, if the Three-Judge Court was correctly convened, as we believe it was...." (461 F. 2d at 539)

Similarly in the instant case, should this Court determine that appellant has presented a justiciable issue (and therefore that the three-judge court was correctly convened), its appellate jurisdiction is at an end; it must then remand to the district court for re-entry of the three-judge court's decision, to permit a timely § 1253 appeal to the Supreme Court.

No reconsideration of the merits of the claim by the Statutory Court is necessary, especially since the Supreme Court's subsequent decision in Sosna v. Iowa, 419 U.S. 393 (1975), upholding a durational residence requirement in a divorce proceeding, supports the result reached by the three-judge District Court in this case.

POINT III

THE SUPREME COURT IN SOSNA v. IOWA, 419 U.S. 393(1975), USING THE SAME REASONING AS THE THREE-JUDGE COURT HERE HELD THE CONSTITUTION DOES NOT COMPEL STATE COURTS TO EXTEND JURISDICTION TO ALL MATRIMONIAL ACTIONS IN WHICH ONE PARTY IS A DOMICILIARY OF THE STATE.

Should this Court determine that it must review the decision of three-judge Court upholding the validity of N.Y.D.R.L. § 230, it will find that the Supreme Court's decision in Sosna v. Iowa, 419 U.S. 393, 42 L Ed 2d 532(1975) requires that the decision of the statutory Court be affirmed. Specifically, the decision in this case analyzed the issues in just the same way as the Supreme Court did several months later and came to the same conclusion. The distinction between the New York statute and the Iowa one at issue there - that in limited circumstances New York requires 2 years durational residence - will be shown to be a distinction without a difference, especially because durational residence is not a pre-condition for bringing a divorce action in New York except where one spouse is not a resident. Even in that case, the same durational residence as is imposed by Iowa - one year - is applicable except where New York has not had even a "modicum of attachment", (Sosna v. Iowa, supra, 42 L. Ed 2d 532 at 545) with the intact marriage.

New York's history of forbearing in the exercise of jurisdiction in matrimonial cases where there was no contact with the intact marriage also makes this a stronger candidate for the invocation of the principle announced in Sosna, supra.

A. Durational residence as a pre-condition for a State's exercise of jurisdiction over divorce serves important State interests.

In deferring to the paramount interest of another State, in securing for its decrees full faith and credit of other states and in establishing public policy only over marital status with which the State has substantial contact, the laws of Iowa and New York at issue in Sosna v. Iowa, 419 U.S. 393, 42 L. Ed 2d 532(1975) and in this case, respectively, serve important State purposes. The Supreme Court in Sosna (42 L. Ed 2d 532 at 545) and the statutory District Court here (380 F. Supp. 985 at 995) both recognized the importance of the State's interest in exercising jurisdiction over divorce in a manner consistent with the holdings of the Supreme Court in Williams v. North Carolina cases (317 U.S. 287[1942]; 325 U.S. 226[1945]. These cases provide by their example eloquent testimony to the necessity of one State's deference to the more substantial interest of another.

Mr. Williams and Mrs. Hendrix, both married and domiciled in North Carolina for many years, went to Nevada in May, 1940, and the following month, they each filed for divorce claiming to be bona fide

and continuous residents of Nevada. Neither defendant was personally served within the State nor appeared, Williams v. North Carolina, 317 U.S. 287 at 289-90. Divorce decrees were granted to each of them on the grounds of "extreme mental cruelty" (Id. at 290).

They then immediately married and, shortly after, returned to North Carolina where they ultimately were convicted of bigamy (Id. at 290-1, 293). North Carolina had taken the position that, since the Nevada decree was based on substituted service, it was not entitled to full faith and credit (Id. at 290-1), but the Supreme Court held that domicile of the plaintiff is a sufficient minimum to establish jurisdiction in matrimonial actions (Id. at 298-9).

The Court did not reach the question whether there was domicile in Nevada, since the decision below did not rely on that finding (Id. at 291, 302); but it remanded the cause to the Supreme Court of North Carolina. Three years later, it was back (325 U.S. 226[1945]). The parties had again been convicted of bigamy, this time the Courts of North Carolina found that neither Mr. Williams nor Mrs. Hendrix had established bona fide domiciliary residence in Nevada sufficient to establish jurisdiction over these divorce proceedings. This time the convictions were upheld and the Nevada divorces were effectively collaterally attacked - tragically for the parties.

The Supreme Court held that North Carolina with its serious interest in the marriage had a right to determine the domicile of the Nevada divorcees for itself (325 U.S. 226 at 230-1):

> ". . .those not parties to a litigation ought not to be foreclosed by the interested actions of others especially not a State which is concerned with the vindiction of its own social policy and has no means, certainly no effective means, to protect that interest against the se[illegible] action of those outside its borde[illegible]he State of domiciliary origin [illegible]uld not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.
>
> These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is in[illegible]t in the practical application of the concept of domicile in the context of our federal system."

These cases dramatically exemplify the problems arising when a State extends its jurisdiction over matrimonial actions to the limits permissible under the Constitution. In so doing Nevada encouraged fraud in its Courts, exposed its judgment to successful

collateral attack in another jurisdiction, ignored the far more substantial interest which a sister state had in enunciating the social policy which governed North Carolina domiciliaries and issued judgments against North Carolina residents dealing with events which took place in North Carolina without the defendants having more of an opportunity to be heard than the Constitution minimally requires.*

The decisions in the two Williams cases do not support a holding that the Constitution requires every State to exercise every vestige of jurisdiction as Nevada has. In Williams I, Justice Douglas specifically describes Nevada as "adopt[ing], as it has power to do" its particular subject matter jurisdiction. All the opinions in both cases deplore the difficulties created by exercise of jurisdiction whenever domicile of one party has been established. Justice Jackson in eloquent dissent said (Id. 317 U.S. 287, 312):

> "It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there."

*As Justice Jackson said in dissent (317 U.S. 287, 316):

> "The opinion concedes that Nevada's judgment could not be forced upon North Carolina in absence of personal service if a divorce proceeding were an action in personam. In other words, settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill."

Compare Armstrong v. Manzo, 380 U.S. 545 (1949) in which it was held that a natural father had to be given notice and opportunity to be heard in an adoption proceeding.

Also see Estin v. Estin, 334 U.S. 541 (1948).

Thus the State has a compelling interest in limiting the scope of its jurisdiction in matrimonial cases to prevent the unfortunate result in Williams v. North Carolina, supra.

The three-judge Court in Iowa had found that State had such a compelling interest. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa, E.D., 3J, 1973), aff'd 419 U.S. 393(1975). Four other jurisdictions had also found such a compelling interest. Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973), aff'd sub nom Makres v. Askew, 500 F. 2d 577 (5th Cir. 1974); Caizza v. Caizza, 291 So. 2d 251 (Fla. Sup. Ct., 1974); Coleman v. Coleman, 291 N E 2d 530 (Sup. Ct., Ohio 1972); Whitehead v. Whitehead, 492 F. 2d 939, 945 (Sup. Ct., Hawaii 1972). By comparison judgment based on a finding that there was no sufficiently compelling state interest to justify durational residence statutes in divorce cases have been reversed or vacated McCay v. South Dakota, 366 F. Supp. 1244 (D.S. Dak. 1973), judgment vacated and dism. as moot, _____U.S._____43 L W 3415(1/28/75); Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I., 1973), judgment vacated and dism. as moot, ____U.S._____ 43 L W 3415(1/28/75); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973), reversed 512 F. 2d 430 (9th Cir. 1975).

B. Sosna v. Iowa, 419 U.S. 393 (1975), authoritatively establishes rationality as the standard by which residence in matrimonial actions is to be measured.

The Supreme Court measured Iowa's durational residence requirement by determing whether it was reasonable (e.g. 42 L. Ed 2d 532 at 545)

> "Iowa's residency requirement may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience."
>
> * * *
>
> "A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere."

The Court rejected the compelling state interest test of Memorial Hospital v. Maricopa County, 415 U.S. 250(1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969)(42 L. Ed 2d 532, 546):

> "We therefore held that the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution of the constitutional issue presented than was the case in Shapiro, supra, Dunn, supra, and Maricopa County, supra."

Yet plaintiffs still seeks to measure New York's statute by the compelling interest test, claiming that the fact that because in certain instances a two, rather than one, year residence is required distinguishes this statute from Iowa's (br. pp 18-20). Even were the Court to reach a different result as to the validity of this New York requirement, there is no justification for subjecting it to stricter scrutiny.

Furthermore, New York's statute is not more restrictive than Iowa's. In just the cases where the residence requirement would provide most difficulties - when the spouse also resides in the State, - New York does not impose a durational residence requirement at all and when New York had any contact with the marriage, the requirement is the same as Iowa's. Only in instances in which there is no such contact with the marriage or the non-resident spouse, is the two-year requirement imposed. Residence within the State for a particular time is not required for bringing an action for divorce in New York. It is one of several contacts with the subject matter required to establish the quasi-in-rem subject matter jurisdiction necessary in such cases.

If both parties reside in the State and the cause of action arose there, an action can be begun the next day (N.Y.D.R.L. § 230[4]). Compare the Wisconsin statute disapproved in Wymlenberg v. Syman, 328 F. Supp. 353 (E.D. Wis. 1971), sum. jdgmt. granted 54 F.R.D. 193(E.D. Wis. 1972). For example, if a couple who were married and had lived in New Jersey decided to separate and each

to move to New York State the next day, they could sign a separation agreement as a beginning of a matrimonial action in New York (N.Y.D.R.L. §§ 170[1], 230[4]). Or if one of them previously had committed adultery in New York, the other could sue on that ground the next day (N.Y.D.R.L. §§ 170[4], 230[4]). Or if the same couple moved to New York as husband and wife and one was cruel to the other or one committed adultery on their first day of residence, the other could file for divorce the next day (N.Y.D.R.L. §§ 170[1], 230[4]).

If only one party to the marriage is a resident and there is some contact with the marriage, one year durational residence is required as an objective indicia of domicile (N.Y.D.R.L. § 230[1]). Contact with the marriage occurs when the marriage is performed in the State, or the parties have resided there as husband and wife (N.Y.D.R.L. § 230[1]-[2]). Furthermore, jurisdiction is extended if the cause which will be the subject of the proceeding occurred in the State and one party has resided there for one year (N.Y.D.R.L. § 230[3]).

But where there has been no contact with the intact marriage or the cause of action to be proven, New York does not exert jurisdiction over the marriage unless and until one party has resided there for two years (N.Y.D.R.L. § 230[5]).

Thus, New York does not determine to exercise jurisdiction over marriages on the basis of durational residence. Its classification takes into account the sum of all contacts with the marriage.

Such a statute responds to the compelling interests of the State in countenancing only fair proceedings, in preventing fraud, promoting the finality of its decrees and in deferring to the more substantial interest of a sister state in the interest of comity.

As the Court below held (380 F. Supp. 985, 995):

> "New York has granted the right to divorce and afforded a forum on a perfectly reasonable pattern. It cannot fairly be argued that such a statute inhibits migration into the state or imposes an irrational constraint upon the new domiciliary's appeal to the court for relief in respect to his or her marital condition. That the state might have gone further and provided other bases of jurisdiction does not mean that it has violated the constitutional rights of potential suitors in not doing so. The jurisdictional requirements form part of a coherent whole, particularly when read with Domestic Relations Law, § 170 and the nature of the grounds of divorce there created. The statutory scheme neither implicates any invidious discrimination against recent domiciliaries nor manifests a will to inhibit migration into this state, but only a concern with establishing adequate jurisdictional bases for adjusting marital relations in the light of the coexisting powers of other states to affect the same relationships in the interest of the spouse domiciled in such other states."

C. <u>New York's statute defers to the paramount interest of a sister state.</u>

The two year requirement is invoked only when it is to be expected that another jurisdiction has greater contacts with

the marriage and cause of action.

Interestingly, Sosna v. Iowa provides a graphic illustration of that concept. The plaintiff and defendant were married in Michigan and moved to New York in 1967, residing here as husband and wife until 1971. Thereafter plaintiff moved to Iowa and immediately sued for divorce there (Sosna v. Iowa, 42 L. Ed 2d 532, 538). In that case, New York had the paramount interest which Iowa's law vindicated, because during the pendency of the litigation plaintiff obtained a divorce in New York (42 L. Ed 2d at 540 n.7).

In his partial dissent, Judge Dooling failed to note the marked difference between situations where the one-year and two-year requirements apply. In the latter case New York has an interest in the marriage or cause of action at issue between spouses residing in different states. In the former New York's interest is inferior to the State which had contact with the intact marriage.

New York has a compelling interest in limiting the instances when a non-resident defendant will have to appear in this State to cases in which he has had contact with the State (N.Y.D. R.L. § 230[1]-[4]) or where his spouse has resided here as long as two years, thus creating a substantial interest on the part of New York in her status.

If Mrs. Mendez had prevailed, Mr. Mendez, a citizen and

domiciliary of Puerto Rico would have to defend an assault* which occurred in Puerto Rico when both parties were domiciliaries and had been married there. General doctrines of fairness would give preference to a Puerto Rican forum for a decent period of time.

Similarly, in the Roman case, California has an interest superior to New York's with reqard to that marriage and if Mr. Roman resides there Mrs. Roman has access to that forum.

New York's statutory scheme has always restricted divorce jurisdiction when there was no contact with the intact marriage. Before the enactment of this statute (L. 1966, c. 254, § 9, eff. 9/1/67, N.Y.D.R.L. § 230), there was no jurisdiction in divorce cases where there was no contact with the intact marriage or the cause of action, even if one party was a domiciliary for many years. Former N.Y.D.R.L. § 170(L. 1962, c. 313, § 7, derived from former CPA § 1147 which itself was derived from prior law) provided:

> "Action for divorce. In any of the following cases, a husband or a wife may maintain an action against the other party to the marriage to procure a judgment divorcing the parties and dissolving the marriage by reason of the defendant's adultery:
>
> 1. Where both parties were residents of the state when the offense was committed.

*The concept of fault still plays an important part in Puerto Rican divorce cases, Laws of Puerto Rico, Title 9, § 321 pp. 10-11, supra.

2. Where the parties were married within the state.

3. Where the plaintiff was a resident of the state when the offense was committed and is a resident thereof when the action is commenced.

4. Where the offense was committed within the state and the injured party when the action is commenced is a resident of the state."

Under the former law even if Mrs. Mendez or Mrs. Roman had a cause of action based on her husband's adultery, New York Courts would not have had jurisdiction over it. And that former section is unassailable under the reasoning advanced here, because there was no durational residence requirement. Thus, with the addition of durational residence requirements, the law became less restrictive, rather than more.

If the statute were held invalid, the prior law would put appellant in a worse position. In the absence of the statute there would be no jurisdiction over divorce at all.

Since there is no fundamental common law right to a judicial divorce, the scope of jurisdiction is solely a function of the statute which both creates and limits it. Caldwell v. Caldwell, 298 N. Y. 146, 152 (1948); Eckart v. Eckart, 34 A D 2d 685 (2d Dept. 1970); Sternshuss v. Sternshuss, 71 Misc 2d 552 (Sup. Ct., Queens Co. 1972); Erickson v. Erickson, 48 N.Y.S. 2d 588 (Sup. Ct., Chautauqua Co. 1944). Also see Matter of Seitz v. Drogheo, 21 N Y 2d 181, 185 (1967); Fiorentino v. Probate Court,

310 N E 2d 112, 115-6(Sup. Ct. Mass. 1974); Coleman v. Coleman, 291 N E 2d 530 (Sup. Ct., Ohio 1972); Porter v. Porter, 296 A D 2d 900 (Sup. Ct., N.H. 1972); Whitehead v. Whitehead, 492 F. 2d 939, 947 (Sup. Ct., Hawaii 1972).

Actions for divorce are not in personam actions. Otherwise no plaintiff could sue in his own domicile if his spouse resided outside the State. These actions are substantially in rem. Usher v. Usher, 41 A D 2d 368(3rd Dept. 1973); Sacks v. Sacks, 47 Misc 2d 1050 (Sup. Ct., N. Y. Co. 1965). Also see Williams v. North Carolina, 317 U.S. 287, 297-9(1942); Williams v. North Carolina, 325 U.S. 226, 232(1945); Shiffman v. Askew, 359 F. Supp. 1225, 1230(M.D. Fla. 1973), aff'd Makres v. Askew, 500 F. 2d 577 (5th Cir. 1974). Therefore contact with marriage res is a valid basis for jurisdiction. New York does not distinguish between marriage over which it exercises jurisdiction on the basis of durational residence. Its classification takes into account the sum of all contacts with the marriage. Such a statute responds to the interests of the State in countenancing only fair proceedings, in preventing fraud, promoting the finality of its decrees and in deferring to the more substantial interest of a sister state in the interest of comity.

D. Appellant is not deprived of access to New York Courts but that right is deferred and in the meantime she has access to the Courts of California.

The Supreme Court held that the Iowa statute did not permanently prevent plaintiff's suit for divorce, but merely deferred access. Sosna v. Iowa, 42 L. Ed. 2d 532, 544, 547. This statute also only defers access to New York Courts. Sternshuss v. Sternshuss, 71 Misc 2d 552 (Sup. Ct., Queens Co. 1972); Davis v. Davis, 210 N.W. 2d 225-6 (Sup. Ct., Minn. en banc 1973); Porter v. Porter, 296 A 2d 900 (Sup. Ct., N.Y. 1972).

The Supreme Court (42 L. Ed. 2d 532 at 547) distinguished Boddie v. Connecticut, 401 U.S. 371 (1971) on the grounds that in that case Mrs. Boddie was deprived absolutely of access to the matrimonial courts. Furthermore, the unconstitutionality of fees as a precondition to divorce turned on the holding that Connecticut monopolized the dissolution of marriage (id. at 374, 376). But here New York has not monopolized the means of dissolving that relationship. It has stayed its hand. So it is to California that Mrs. Roman must turn unless and until she has resided in New York for two years as the original plaintiff, Mrs. Mendez now has.

The fact that plaintiffs have access to Courts in other jurisdictions makes these statutes different from durational residence statutes previously held invalid and is a further reason for not subjecting this statute to strict scrutiny. Thus, although they did not immediately obtain a right to sue in New York, they had not been

deprived of anything and their right to travel had neither been penalized nor deterred. Inherent in Shapiro v. Thompson, 394 U.S. 618 (1968), is the proposition that when Mrs. Thompson moved from Massachusetts to Connecticut she lost any eligibility for public assistance from Massachusetts, but had not acquired any rights in Connecticut. She thus was penalized, for having been a recent traveller. If she had received benefits from Massachusetts for the first year after leaving that State, quite a different case would have been presented. Similarly, Mr. Blumstein of Dunn v. Blumstein, 405 U.S. 330 (1972), lost his right to vote at his prior residence when he moved to Tennessee, but because he was not permitted to vote until he had resided in Tennesse for at least a year, he was disfranchised for all elections held during that time. Mrs. Mendez and Mrs. Roman are not put in a similar situation. They carry their bundle of matrimonial rights with them when they moved to New York.

The court below correctly held that the statute does not inhibit migration into the State and the Supreme Court in Sosna v. Iowa, 419 U.S. 393, did not deem a claim to the contrary worthy of comment.

E. The statute serves the important State purpose of preventing a fraud on the Courts and protecting the finality of its judgments.

The durational residence provisions were enacted as part of the substantial liberalization of New York's matrimonial law, when the occurrence of fraud became a realistic possibility.

In view of the willingness of persons seeking a divorce to migrate temporarily to States having favorable divorce laws (e.g. Lorenzen, "Extraterritorial Divorce, Williams v. North Carolina, 54 Yale L.J. 779, 801 [1945]), the Legislature could and did determine that it did not wish its courts to be used as vehicles for the fraud inherent in this practice.

This determination is an extension of considerations which led to the liberalization of the substantive grounds for divorce. Thus, the Report of the Joint Legislative Committee on Matrimonial and Family Laws* makes frequent reference to the notorious deception and collusion practiced by persons seeking to establish adultery when that was the only ground for divorce in New York. The report also noted the consequent expansion of the New York action for annulment and the fraud practiced by the parties in those actions. Having experienced one type of fraud in its courts and taken steps to eliminate it, New York understandably has sought to forestall and eliminate another common type of fraud.

This was the precise purpose of this new section (N.Y.D.R.L. § 230) recommended by the Special Committee on Matrimonial Law of the New York County Lawyers' Association and the Association of the Bar of

* The entire Committee Report is contained in Volume 1 of New York Legislative Documents for 1966 as Document # 8.

the City of New York. In establishing residence requirements for the first time, it was recognized that the liberalized standards might attract non-domiciliaries to defraud the Court and avoid the proper jurisdiction of their own State tribunals. As the Legislative Committee put it (Document # 8, 1966, N.Y. Legislative Documents, pp. 103-4):

> "New York, as long as it retains the dubious distinction of being the only state in this nation which has but one ground for divorce, needs no protection against its becoming attractive to citizens from sister-states as a place where divorce can be obtained. The Committee's proposals do not add grounds for divorce which will make New York an 'easy' divorce state. However, at the suggestion of the Special Committees on Matrimonial Law of the New York County Lawyers' Association and the Association of the Bar of the City of New York, the Committee has proposed the above residence requirements to ensure against the use of our courts in matrimonial proceedings by outsiders.
>
> Each of the five alternative provisions guards against 'forum shopping' by non-New Yorkers, in our courts".

The Supreme Court in Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 546-7 rightly rejected the suggestion that individualized determinations of domicile would adequately prevent fraud. Such suggestions are unpersuasive since they ignore the widespread experience just alluded to where fraud repeatedly has been committed under these circumstances and where judgments in "quickie" divorce jurisdictions have been collaterally attacked, e.g. Williams v. North Carolina, supra; Rosensteil v. Rosensteil, 21 A D 2d 635 (1st Dept.

1964), affd. 16 N Y 2d 64 (1965), cert. den. 384 U.S. 971 (1966); Krause v. Krause, 282 N.Y. 355 (1940).

POINT IV

THE COURT BELOW PROPERLY DENIED A CLASS ACTION ORDER.

The three-judge Court refused to issue a class action order because the "'class' or 'classes' are illimitable and the class members have not the concurrence in time and nature of interest which could bring them into the focus of this case". (380 F. Supp. 985, 996). Appellant has not been harmed by this decision. Her broad request for relief has been considered and the case has not been found moot; because intervention was freely permitted. This is a more appropriate procedure than the one used in Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 539-43, where severe questions of mootness were unnecessarily raised. See dissent of Mr. Justice White (Id. at 547-52).

The court below properly exercised its discretion in denying the class action order.

CONCLUSION

FOR THE ABOVE REASONS, THE DECISION BELOW WITH RESPECT TO JURISDICTION SHOULD BE AFFIRMED; OR IN THE ALTERNATIVE, THE DECISION BELOW SHOULD IN ALL RESPECTS BE AFFIRMED; OR IN THE ALTERNATIVE THE CASE SHOULD BE REMANDED FOR THE ENTRY OF A FRESH ORDER BY THE THREE-JUDGE COURT UPHOLDING THE VALIDITY OF N.Y.D.R.L. § 230.

Dated: New York, New York
September 26, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellee herein. On the 26th day of September , 1975, she served the annexed upon the following named person :

JOHN C. GRAY, JR.
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Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
26th day of September , 1975

Assistant Attorney General
of the State of New York